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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

THOMAS MENCHACA AND WIFE, IRMA MENCHACA,
Petitioners,

vs.

CHRYSLER CREDIT CORPORATION,
BLASA BLUME, J. MARTINEZ,
CITY OF LAREDO, NORMAN CLARK,
AND BLAZER FINANCIAL SERVICES, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO PETITION FOR CERTIORARI

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The Respondents, Chrysler Credit Corporation, Blasa Blume, J. Martinez, City of Laredo, Norman Clark and Blazer Financial Services, Inc., pray that a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES III

REASON FOR DENYING THE WRIT 1

I. THERE IS NO CONFLICT BETWEEN THE CASES CITED BY PETITIONERS AND THE DECISIONS OF THE TRIAL COURT AND COURT OF APPEALS IN THIS CASE 1

II. THE PROCEDURAL POSTURE OF THIS CASE REQUIRED THE TRIAL COURT TO DETERMINE ITS JURISDICTION TO ACT PRIOR TO PROCEEDING TO TRIAL ON THE MERITS 4

III. RULE 12 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS NOT UNCONSTITUTIONAL FOR ALLOWING A TRIAL JUDGE TO DISPOSE OF THE JURISDICTIONAL ISSUE WITHOUT A JURY 5

CONCLUSION 7

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

Page

Cases:

Adickes v. Kress & Co.,
398 U.S. 144 (1970) 3

Conley v. Gibson,
355 U.S. 41 (1957) 6

Gibbs v. Buck,
307 U.S. 66 (1939) 4

Gilbert v. David,
235 U.S. 561 (1915) 3

Land v. Dollar,
330 U.S. 731 (1947) 1

McLain v. Real Estate Board,
444 U.S. 232 (1980) 6

St. Paul Mercury Indem. Co. v. Red Cab Co.,
303 U.S. 283 (1938) 2

Wetmore v. Rymer,
169 U.S. 115 (1898) 3

American Federation of Musicians v. Bonatz,
475 F.2d 433 (3rd Cir. 1973) 3

Berandinelli v. Castle & Cooke, Inc.,
587 F.2d 37 (9th Cir. 1978) 1

Data Disc, Inc. v. Systems Technology Assoc. Inc.,
557 F.2d 1280 (9th Cir. 1977) 3

Fireman's Fund Ins. Co. v. Railway Express Agency,
253 F.2d 780 (6th Cir. 1958) 2

Gough v. Rossmore Corp.,
487 F.2d 373 (9th Cir. 1973) 3

Industrial Electronics Corp. v. Cline,
330 F.2d 480 (3rd Cir. 1964) 4

International Video Corp. v. Ampex Corp.,
484 F.2d 634 (9th Cir. 1973) 6

McBeath v. Inter-American Citizens for Decency Comm., 475 F.2d 433 (3rd Cir. 1973) 3

Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel, Co., 469 F.2d 416 (5th Cir. 1972) 6

Sunray DX Oil Co. v. FPC,
351 F.2d 395 (10th Cir. 1965) 1

Thornhill Publishing Co. v. General Telephone & Electronics Corp., 594 F.2d 730 (9th Cir. 1979) 4

Wade v. Rogalia,
270 F.2d 280 (3rd Cir. 1959) 1

Zunamon v. Brown,
418 F.2d 883 (8th Cir. 1969) 1, 2

Federal Rules:

Fed. Rule, Civ. Proc. Rule 12(d), (h) 5, 6

Other Authorities:

5 Moore's Federal Practice §38.36 (2.-2) p. 300 (1979) 5

RESPONSE TO PETITIONERS' REASONS FOR GRANTING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE CASES CITED BY PETITIONERS AND THE DECISIONS OF THE TRIAL COURT AND COURT OF APPEALS IN THIS CASE.

In *Berandinelli v. Castle and Cooke, Inc.*, 587 F.2d 37 (9th Cir. 1978), cited by Petitioners as in conflict with this case, the court simply cited the general rule that where a genuine issue of fact exists which would determine the court's jurisdiction to act as well as determine the merits of the cause of action, the court has jurisdiction to determine its jurisdiction in a trial on the merits. *Land v. Dollar,* 330 U.S. 731, 67 S. Ct. 1009, 91 L.Ed. 1209 (1947). In *Berandinelli,* the issues concerning the court's jurisdiction and those on the merits differed, and the court disposed of the case on a plea to the jurisdiction. That case is simply not in point. In *Sunray DX Oil Co. v. F.P.C.,* 351 F.2d 395 (10th Cir. 1965) the court recited the same general rule. However in *Sunray,* the Court of Appeals was forced to determine the jurisdictional issue, and did so by an examination of the facts and circumstances of the case. There was no demand for a jury in that case, and no constitutional issues were raised.

The final three cases cited by Petitioners all concern the determination of whether the requisite jurisdictional amount of damages exist in a given case. *Zunamon v. Brown,* 418 F.2d 883 (8th Cir. 1969); *Wade v. Rogalia,* 270 F.2d p. 280

(3rd Cir. 1959); *Fireman's Fund Insruance Co. v. Railway Express Agency,* 253 F.2d 780 (6th Cir. 1958). Cases involving the jurisdictional amount question fall into a separate category since in any case where unliquidated damages are involved, the amount of damages is a pure question of fact. Even then, however, each of these cases points out that the mode of determining jurisdiction is left to the discretion of the trial court. The court may receive testimony and weigh affidavits, and it if appears to the court "to a legal certainty" that the court has no jurisdiction the case should be dismissed. *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 58 S. Ct. 586, 82 L.Ed. 845 (1938). As the court stated in *Zunamon, supra,* 418 F.2d at 886, the scope of the pretrial jurisdictional inquiry depends upon the pleadings and facts in each particular case.

This action was a civil rights action for wrongful repossession of a vehicle. Petitioners alleged that agents for defendant Chrysler Credit Corporation acted in concert with two City of Laredo police officers to wrongfully reposess their automobile. It is undisputed that the police were called to the scene of the repossession to quell a disturbance, and that they left the scene prior to the time the car was taken away after satisfying themselves that there would be no more public disturbance. The police officers were simply doing their job, and it the repossession which was completed after they left the scene was wrongful, the petitioners could have had their remedy in state court.

This is essentially what the trial court found after considering all of the evidence after a plenary hearing on the issue of jurisdiction; and that this set of facts did not consitute state action. There was absolutely no evidence of any conspiracy or agreement between the police officers and the other defendants. In such a case the trial court was justified in

finding that as a matter of law there was no state action sufficient to invoke the court's jurisdiction. The Petitioners were given every opportunity to establish jurisdiction in the district court, and were unable to do so. In this sense, this case differs from such cases as *American Federation of Musicians v. Bonatz,* 475 F.2d 433 (3rd Cir. 1973) and *McBeath v. Inter-American Citizens for Decency Committee,* 374 F.2d 359 (5th Cir. 1976) in which the trial courts were reversed for failing to give the Plaintiffs an adequate opportunity to prove up jurisdiction. After a full hearing on the question, the judge had the authority to dismiss the complaint. *See Data Disc, Inc. v. Systems Technology Associates, Inc.,* 557 F.2d 1280 (9th Cir. 1977).

> It is also insisted that the court erred in itself considering the testimony and in not submitting the issue to the jury. But while the court might have submitted the question to the jury, it was not bound to do so; the parties having adduced their testimony, pro and con, it was the privilege of the court to dispose of the issue upon the testimony which was fully heard upon that subject. *Gilbert v. David,* 235 U.S. 561, 35 S. Ct. 164, 59 L.Ed. 360 (1915); *Wetmore v. Rymer,* 169 U.S. 115, 18 S. Ct. 293, 42 L.Ed. 682 (1898)

Finally, it is clear that in this case the decision on the jurisdictional issues was not "completely intermeshed" with the merits of the claim. *See Gough v. Rossmore Corp.,* 487 F.2d 373 (9th Cir. 1973). The trial court found that the police officers' appearance at the scene was not sufficient to constitute state action. *See Adickes v. Kress & Co.,* 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed. 2d 142 (1970). If the repossession was wrongful, as alleged, the Plaintiffs still had their remedy in state court on the merits. Thus a decision against them on the jurisdictional issue in federal court, did not constitute a decision on the merits but merely forced the

Plaintiff to seek redress in state court. The trial court acted within its authority in dismissing the action. *See Thornhill Publishing Co. v. General Telephone & Electronics Corp.*, 594 F.2d 730 (9th Cir. 1979).

II.

THE PROCEDURAL POSTURE OF THIS CASE REQUIRED THE TRIAL COURT TO DETERMINE ITS JURISDICTION TO ACT PRIOR TO PROCEEDING TO TRIAL ON THE MERITS.

This case was dismissed after a hearing held upon Plaintiff's application for a temporary injunction. In response to Plaintiff's request for an injunction, Defendants filed, among other motions, a motion to dismiss for want of jurisdiction, which placed the burden upon Plaintiffs to prove jurisdiction. *Gibbs v. Buck,* 307 U.S. 66, 59 S. Ct. 725, 83 L.Ed. 1111 (1939). "Where the challenge is interposed on an application for a preliminary injunction, the Plaintiff is required to adequately establish that there is at least a reasonable probability of ultimate success on the question of jurisdiction when the action is tried on the merits." *Industrial Electronics Corp. v. Cline,* 330 F.2d 480 (3rd Cir. 1964). If the Plaintiff, as in this case, fails to set up such facts by a preponderance of the evidence as would give the court jurisdiction, he has not only failed to meet the standard required for the court to grant extraordinary relief, but has also established that the case should be dismissed. The court should not be put the task of determining the issue in a full pre-trial hearing, and then rehearing the evidence before a jury on the chance that they

might interpret the facts differently. This is particularly true when the jurisdictional issue concerns statutory coverage of a given set of facts, such as "state action", where the facts are not materially in dispute.

> As a matter of policy, however, there is much to be said for approaching problems of statutory coverage as triable to the court when reasonably separable from the facts of violation. The difference is this: If coverage is treated as substantive for purposes of mode of trial, the issue of whether a cause of action is stated must be left to the jury in cases in which underlying facts are not in dispute but different inferences may be drawn from them. Thus on the same business arrangements one case may be decided one way and another in a different way, as the jury may find that the arrangements did or did not affect commerce, or in the case of the Jones Act one employee may recover as a seaman while another with the same duties may not. Surely these are matters that should be treated as a matter of law so that the perimeter of the statute can be worked out in the appellate courts. 5 Moore's Federal Practice §38.36 (2.-2), p. 300 (1979).

III.

RULE 12 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS NOT UNCONSTITUTIONAL FOR ALLOWING A TRIAL JUDGE TO DISPOSE OF THE JURISDICTIONAL ISSUE WITHOUT A JURY.

Federal Rule of Civil Procedure 12(d) provides, in pertinent part, "the defenses specifically enumerated (1)-(7) in subdivision (b) of the Rule, whether made in pleading or by motion . . . shall be heard and determined before trial

on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." Rule 12(h)(3) provides, "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." It is fundamental that a court must have jurisdiction over the subject matter of the controversy before it may act, and the court's duty to dismiss a complaint is not a discretionary matter where it appears that the court lacks jurisdiction. *See International Video Corp. v. Ampex Corp.,* 484 F.2d 634 (9th Cir. 1973). Although a complaint should not be dismissed unless "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed. 80 (1957); *see McLain v. Real Estate Board,* 444 U.S. 232, 100 S. Ct. 502, 62 L.Ed. 441 (1980), if the Plaintiff is afforded every opportunity at a plenary pre-trial hearing to establish jurisdiction and cannot do so, then the complaint should be dismissed. This is not deprival of a jury trial, but a determination as a matter of law that jurisdiction does not exist. *See Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.,* 469 F.2d 416 (5th Cir. 1972).

CONCLUSION

For the reasons stated, the Writ of Certiorari to the Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I Richard N. Hansen certify that on this the _____ day of October, 1980, a true and correct copy of the attached Response to Petition for Certiorari was Mailed Parcel Post to: Jacob G. Hornberger, Jr., Attorney for petitioiner at 915 Victoria Street, Laredo, Texas 78040.

_____

Attorney for Respondent.